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No. 86-1199

In the Supreme Court of the United States

OCTOBER TERM, 1986

JAMES L. KINGTON AND DON EARNEY, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether 18 U.S.C. (& Supp. III) 3731 authorizes the government to appeal a suppression order that is entered after the jury in the first trial has been discharged but before a second trial has begun.

2. Whether bank records obtained by FBI and IRS agents pursuant to grand jury subpoena may be suppressed because the grand jury was given summaries of the records rather than the records themselves.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A11) is reported at 801 F.2d 733. The opinion of the district court (Pet. App. B2-B7) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 3, 1986. A petition for rehearing was denied on November 12, 1986 (Pet. App. C1-C2). The petition for a writ of certiorari was filed on January 9, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioners are the former president and vice-president of the now-defunct Abilene National Bank in Abilene, Texas (Pet. App. A4). In July 1983, a federal grand jury subpoenaed certain records of the bank (*ibid.*;

id. at F1). The bank delivered the records to agents of the Federal Bureau of Investigation (FBI) and the Internal Revenue Service (IRS), who in turn prepared and presented summaries of the records to the grand jury (*id.* at A4, F1-F2). After reviewing the summaries, the grand jury returned a 53-count indictment against petitioners. The indictment charged them with misapplication of bank funds, in violation of 18 U.S.C. 656, falsifying a loan application, in violation of 18 U.S.C. 1005, causing a bank to fail to report a currency transaction over $10,000, in violation of 31 U.S.C. (1976 ed.) 1059 and 1081, and filing a false income tax return, in violation of 26 U.S.C. 7206(1). Pet. App. A4.

Prior to trial, petitioners moved to suppress the subpoenaed bank records (Pet. App. A4). They claimed, among other things, that the government violated the Right to Financial Privacy Act of 1978, 12 U.S.C. (& Supp. III) 3401-3422, when it presented the grand jury with summaries of the subpoenaed records prepared by the FBI and IRS agents, rather than the subpoenaed records themselves (Pet. App. A4). After selecting and swearing the jury, the district court conducted a three-day hearing on the suppression motion (*ibid.*).

Near the end of the suppression hearing, the district court engaged in the following colloquy with defense counsel (Tr. 145-148; Pet. App. F8-F10):

> THE COURT: * * * Now, I discussed with you gentlemen the proposition of the dilemma I find myself on double jeopardy. In the event * * * that I were to suppress this evidence, would the defendants be in a position to waive any claim of double jeopardy in case my ruling were reversed?
>
> * * * * *
>
> MR. KRAGE: I speak for Mr.—the defendant, Mr. James L. Kington, Your Honor. I can tell you that

the defendant, Mr. Kington, is willing to, in response to your—to a possible order that would be favorable on the motion, that if such an order is made by the court suppressing evidence in this case or, alternatively, dismissing this case because of abuse of grand jury process, that Mr. Kington will waive his double jeopardy claim if the government has an appropriate vehicle to appeal, they do decide to appeal, and this waiver is only if they do appeal, not for reindictment, your honor, only if they do appeal this ruling, and I want to make that clear.

THE COURT: Well, and the appeal—my ruling would have to be reversed, of course.

MR. KRAGE: Of course. If it is reversed and remanded for trial, we waive the issue of double jeopardy as a result of the second trial to the extent that any jeopardy may have already attached from the impaneling of this jury, and this waiver is made knowingly, intelligently, and freely.

THE COURT: Mr. Kington, do you agree with this?

MR. KINGTON: Yes, Your Honor.

THE COURT: Counsel on behalf of plaintiff Earney?

MR. RICHARDS: On behalf of Mr. Earney, please the court, I would state to the court that I have discussed this particular issue with Mr. Earney concerning double jeopardy and have explained to him, that I would concur in the stipulation of the co-counsel, Mr. Krage, and that we would waive double jeopardy in this particular situation if the court so—would that be your testimony Mr. Earney?

MR. EARNEY: Yes, sir.

THE COURT: Mr. Earney, do you agree with the waiver?

MR. EARNEY: Yes, sir.

* * * * *

> THE COURT: But now my understanding is, clear understanding is, that neither of these defendants will claim that they can't be tried in this case in the event that I rule suppressing the evidence and an appellate court reverses that ruling.
>
> MR. RICHARDS: Yes, sir.
>
> MR. KRAGE: Yes, your Honor.

The court then indicated that at some future time it would enter a formal order suppressing the evidence and that the government's time for appeal would start to run upon the entry of that written order (Tr. 149; Pet. App. F11).

2. After the hearing, the court discharged the jury (Pet. App. A4). Approximately three weeks later, the court entered its formal opinion and order suppressing the bank records (*ibid.*). In its opinion, the court noted that 12 U.S.C. 3420(1) provides that "[f]inancial records about a customer obtained from a financial institution pursuant to a subp[o]ena issued under the authority of a Federal grand jury * * * shall be returned and actually presented to the grand jury" (Pet. App. B4-B5), and that "summaries alone are not sufficient for the grand jury to return an indictment" (*id.* at B5). Accordingly, the court held that "the use of said subpoenaed documents in the trial of that case on the merits will not be permitted" (*ibid.*).

3. The court of appeals reversed (Pet. App. A1-A11). In response to petitioners' argument that 18 U.S.C. (& Supp. III) 3731 barred the government's appeal (Pet. App. A4-A6), the court held that that statute forbids an appeal by the United States from a suppression order only when the order is entered during trial (*id.* at A5). In this case, the court noted, the government appealed from the "district court's suppression order that was entered three weeks after the district court had ended the trial by discharging the jury" (*ibid.*). In response to petitioners' argument that suppression is appropriate because of the failure of the grand jury to receive the bank records, rather than mere

summaries of those records, the court determined that " 'neither the Fifth Amendment nor any other constitutional provision prescribes the kind of evidence upon which grand juries must act' " (*id.* at A8, quoting *Costello* v. *United States*, 350 U.S. 359, 362 (1956)), that "bank customers have no legitimate * * * expectation of privacy in the records of their accounts maintained by banks" (Pet. App. A9, citing *United States* v. *Miller*, 425 U.S. 435 (1976)), and that "Congress apparently did not intend suppression as a remedy for violation of [12] U.S.C. 3420" (Pet. App. A10).

The court of appeals agreed with the district court that the government violated Section 3420(1) by failing to transfer control over the records to the grand jury (Pet. App. A10).[1] The court found, however, that "[t]he question remains whether a penalty for this violation is available" (*ibid.*), and that the statutory penalties set forth in the Right to Financial Privacy Act are "inapplicable 'to any subpoena or court order issued in connection with proceedings before a grand jury' " (*ibid.*, quoting 12 U.S.C. 3413(i)). Accordingly, the court held that a violation of Section 3420 is subject only to "the same penalties as are other violations of Rule 6" of the Federal Rules of Criminal Procedure, to wit, contempt sanctions (Pet. App. A10-A11).

ARGUMENT

The decision below is correct. It does not conflict with any decision of this Court or of any other court of appeals. Accordingly, review by this Court is not warranted.

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[1] By contrast, the court disagreed (Pet. App. A6-A8) with the district court's conclusion (Pet. App. B5-B7) that 12 U.S.C. 3420 requires bank officials themselves to deliver subpoenaed bank records to the grand jury.

1. Petitioners first contend (Pet. 7-14) that the court of appeals erred in holding that the Criminal Appeals Act, 18 U.S.C. (& Supp. III) 3731, authorized the government's appeal of this suppression order. Petitioners' contention is meritless.

Section 3731 provides, in pertinent part, that the government may appeal any suppression order "not made after the defendant has been put in jeopardy and before the verdict or finding on an indictment or information * * *." In interpreting this provision, this Court has stated that "[t]he legislative history of 18 U.S.C. § 3731 'makes it clear that Congress intended to remove all statutory barriers to Government appeals and to allow appeals whenever the Constitution would permit' " (*United States* v. *Loud Hawk*, No. 84-1361 (Jan. 21, 1986), slip op. 10, quoting *United States* v. *Wilson*, 420 U.S. 332, 337 (1975)). Thus, the courts of appeals have construed 18 U.S.C. (& Supp. III) 3731 to authorize appeal of any suppression order, as long as the appeal is not barred by the Double Jeopardy Clause and does not interrupt an ongoing trial. See, *e.g.*, *United States* v. *Posner*, 764 F.2d 1535, 1538 (11th Cir. 1985), aff'd on appeal from remand, 780 F.2d 1536 (1986) (allowing appeal from an order denying a motion to reconsider a midtrial suppression ruling that was entered after the first trial resulted in a mistrial); *United States* v. *Margiotta*, 662 F.2d 131, 141 & n.26 (2d Cir. 1981), cert. denied, 461 U.S. 913 (1983) (same); *United States* v. *Shears*, 762 F.2d 397, 399-400 (4th Cir. 1985) (allowing appeal of a pretrial suppression ruling after the first trial ended in a mistrial and the second trial had not begun); *United States* v. *Layton*, 720 F.2d 548, 553-554 (9th Cir. 1983), cert. denied, 465 U.S. 1069 (1984) (same); *United States* v. *Harshaw*, 705 F.2d 315, 318-319 (8th Cir. 1983) (allowing appeal from a midtrial suppression ruling that was followed by the declaration of a mistrial).

Here, of course, the government's appeal was not barred by the Double Jeopardy Clause and did not interrupt an ongoing trial. Petitioners waived any double jeopardy objections they may have had in order to encourage the district court favorably to decide their suppression motion. The court then discharged the jury, thus ending the first trial, and it resolved the suppression motion before starting a second trial. It was at that point that the government filed its notice of appeal. Accordingly, the court of appeals was correct in holding that 18 U.S.C. (& Supp. III) 3731 authorized the appeal.[2]

Petitioners err in suggesting (Pet. 7-8) that the court's decision conflicts with the Sixth Circuit's decision in *United States* v. *Payner*, 572 F.2d 144 (6th Cir. 1978). In that case, the district court suspended a bench trial so that the government could appeal a midtrial evidentiary ruling; the court indicated that it would render its verdict only after the Sixth Circuit had decided the suppression issue on appeal. 572 F.2d at 145. The Sixth Circuit held that 18 U.S.C. (& Supp. III) 3731 barred the appeal, but only because the trial was ongoing. Here, there was no ongoing trial. Thus, the decisions are not in conflict.

Nor is there a conflict between the decision below and any of the other cases that petitioners cite. See Pet. 8, 12-13. In *Sanabria* v. *United States*, 437 U.S. 54, 68-69, 75-78 (1978); *United States* v. *Lucido*, 517 F.2d 1, 2-3 (6th Cir. 1975), and *United States* v. *Ember*, 726 F.2d 522, 525 n.6 (9th Cir. 1984), the courts held only that the government cannot appeal a judgment of acquittal; those

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[2] The court of appeals did not hold, as petitioners suggest (Pet. 11-12), that petitioners' waiver conferred jurisdiction on it. Rather, petitioners' waiver ensured that the Double Jeopardy Clause could not be asserted to bar an appeal that was otherwise authorized by 18 U.S.C. (& Supp. III) 3731.

cases are inapposite because no judgment of acquittal is involved here. In *United States* v. *Fatico*, 579 F.2d 707, 710-711 (1978), aff'd after remand, 603 F.2d 1053 (2d Cir. 1979), cert. denied, 444 U.S. 1073 (1980), the court held that 18 U.S.C. (& Supp. III) 3731 *permits* the government to appeal a post-trial order that excludes evidence from a sentencing hearing; that decision is entirely consistent with the decision in this case allowing an appeal from a suppression order entered between trials. The court in *United States* v. *Taylor*, 792 F.2d 1019, 1025 (11th Cir. 1986), petition for cert. pending, No. 86-5746 (filed Sept. 22, 1986), refused to permit a defendant to file a mid-trial motion to suppress evidence, on the ground that any appeal by the government would interrupt an ongoing trial; by contrast, this case involves a suppression order entered after an initial trial has ended. Finally, the court in *United States* v. *Kane*, 646 F.2d 4, 6-7 (1st Cir. 1981), held only that 18 U.S.C. (& Supp. III) 3731 does not authorize the government to appeal a pretrial *discovery* ruling; this case involves a pre-trial *suppression* ruling, which is precisely the type of ruling to which 18 U.S.C. (& Supp. III) 3731 applies.

Petitioners' discussion (Pet. 8-11, 13) of the "plain language" and legislative history of Section 3731 misses the point. The language and legislative history provide only that the government may not appeal a suppression order rendered *during* an ongoing trial. They do not suggest that the government may not appeal a suppression ruling made *between* separate trials. Petitioners forget that the very purpose of Section 3731 was to facilitate the government's appeal of such orders. See *United States* v. *Harshaw*, 705 F.2d at 319.

2. Petitioners next contend (Pet. 15-17) that the court of appeals erred in holding that suppression is not a permissible remedy for the violation of the Right to Financial Privacy Act that occurred here. This contention is also in error.

In the Right to Financial Privacy Act, Congress provided that, except where bank records are obtained pursuant to grand jury subpoena or search warrant, information pertaining to a customer's account may not be disclosed without advance notice to the customer or without the customer's consent. 12 U.S.C. 3402-3405, 3407-3408. The Act sets forth in detail the remedies that are available for violations of these provisions. See 12 U.S.C. 3417. The remedies include awards of costs, damages, and disciplinary actions. But they do not include suppression of bank records. And even these remedies do not apply to violations of 12 U.S.C. 3420(1), the statutory provision that the government was found to have violated in this case.

As the court of appeals noted (Pet. App. A9-A10), the omission of a statutory suppression remedy for a violation of Section 3420(1) is quite significant. In *United States* v. *Miller*, 425 U.S. 435 (1976), this Court held that bank customers do not have Fourth Amendment privacy rights in records that banks maintain concerning their customers' accounts. Accordingly, the Court refused to suppress bank records that the government had obtained by means of a defective grand jury subpoena. In response, Congress enacted Section 3420(1), imposing certain statutory restrictions on the use of bank records. But, in doing so, Congress did not provide bank customers with a right to suppress bank records that are unlawfully used or obtained. In such circumstances, the courts may not engraft a suppression remedy onto the Act. *United States* v. *Frazin*, 780 F.2d 1461, 1466 (9th Cir. 1986); cf. *United States* v. *Caceres*, 440 U.S. 741, 755-757 (1979) (refusing to suppress evidence obtained in violation of an IRS regulation).

Petitioners' contention (Pet. 15-16) that the Right to Financial Privacy Act gives bank customers an expectation of privacy does nothing to support the case for suppres-

sion.[3] The alleged violation in this case – failing to give the grand jury physical custody of the bank records – did not in any way increase the invasion of privacy that any bank customer suffered as a result of the grand jury subpoena in this case. The IRS and FBI agents were clearly authorized to read and summarize the bank records; their failure to convey those records to the grand jury simply reduced the total number of persons to whom the records were disclosed.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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MARCH 1987

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[3] Petitioners are plainly wrong in contending (Pet. 16) that suppression is required because their expectation of privacy is of constitutional magnitude. As noted above, Congress understood that the privacy right it was creating extended beyond the scope of the rights established by the Constitution. See H.R. Rep. 95-1383, 95th Cong., 2d Sess. 34 (1978). In any event, suppression is a remedy only for violations of clearly established constitutional privacy rights (see *United States* v. *Leon*, 468 U.S. 897, 906 (1984)), which this privacy right clearly is not.

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